

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

entitled to inspect the testimony of his co-
DOCKET No. 75 - 1053

B
PRS

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee

vs.

ERNEST HARVEY, JUNIOR,

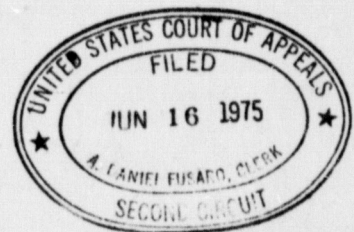
Appellant

On Appeal from the United States District Court
for the District of Vermont

APPELLANT'S APPENDIX A

Bennett E. Greene, Esquire
Attorney for the Defendant-Appellant,

Appointed



4

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UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

UNITED STATES OF AMERICA

v.

GERALD L. DUNHAM, also
known as Gary Dunham,
and ERNEST HARVEY, Jr.

Sections 241, 371, 842,
844 and 2314, Title 18,
United States Code

Ci. No. 74-62

COUNT I

The Grand Jury charges:

From on or about July 1, 1973 up to and including August 4, 1973, GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together with each other and with other persons known to the Grand Jury, to commit offenses against the United States, to wit, to violate Title 18, United States Code, §§ 2314, 842 and 844.

It was part of said conspiracy that GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, and the co-conspirators, would transport in interstate commerce goods, wares, merchandise, securities and money of the value of \$5,000 or more, to wit, the proceeds of a burglary, knowing the same to have been stolen.

It was part of said conspiracy that GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, and the co-conspirators, would receive,

Endorsed: Filed June 25, 1974
Heidi M. Schuster
Deputy Clerk

conceal, transport, ship and store explosive materials, to wit, dynamite, knowing and having reasonable cause to believe that such explosive materials were stolen; in violation of Title 18, United States Code, § 842(h).

It was further a part of said conspiracy that GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, and the co-conspirators, would transport and receive and attempt to transport and receive in interstate commerce an explosive, to wit, dynamite, with knowledge and intent that it would be used unlawfully to damage and destroy a building and other real and personal property; in violation of Title 18, United States Code, § 844(d).

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof the following overt acts were committed within the District of Vermont:

1. On or about August 3, 1973, GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, traveled from the vicinity of Barre, Vermont to Newport, New Hampshire.

2. During June, July and August 1973, GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, and the co-conspirators, had conversations with each other.

(Title 18, United States Code, § 371)

COUNT II

The Grand Jury further charges:

On or about August 3, 1973, GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, unlawfully, willfully and knowingly did transport and receive and attempt to transport and receive in interstate commerce from the District of Vermont to Newport in the State of New Hampshire, explosives, to wit, dynamite, with the knowledge and intent that it would be used to damage and destroy buildings and other real and personal property.

(Title 18, United States Code, § 844(d))

(Title 18, United States Code, § 2)

COUNT III

The Grand Jury further charges:

On or about August 3, 1973, GERALD L. DUNHAM, also known as Gary Dunham, the defendant, having been convicted on May 10, 1971, in the Washington District Circuit Court of Vermont, of burglary in the nighttime, a crime punishable by imprisonment for a term exceeding one year, and ERNEST HARVEY, Jr., the defendant, having been convicted on October 22, 1970, in the Superior Court of Grafton, New Hampshire, of burglary, a crime punishable by imprisonment for a term exceeding one year, unlawfully, willfully and knowingly did ship and transport an explosive, to wit, dynamite, in interstate commerce from the District of Vermont to the State of New Hampshire, and did receive said explosive which had been so shipped and transported.

(Title 18, United States Code, §§ 842(1)(1) and 844(a))
(Title 18, United States Code, § 2)

COUNT IV

The Grand Jury further charges:

On or about August 3, 1973, in the District of Vermont and elsewhere, GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, JR., the defendants, unlawfully, willfully and knowingly did receive, conceal, transport and dispose of explosive materials, to wit, dynamite, knowing and having reasonable cause to believe that such explosive materials were stolen.

(Title 18, United States Code §842(h))

(Title 18, United States Code, § 2)

COUNT V

The Grand Jury further charges:

On or about August 3, 1973, in the District of Vermont and elsewhere, GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, did knowingly and unlawfully carry an explosive, to wit, dynamite, during the commission of the offense of conspiracy to transport stolen property of a value more than \$5,000 in interstate commerce, as contained in Count I of this indictment, which is incorporated herein by reference, a felony prosecutable in a court of the United States.

(Title 18, United States Code, § 844(h))

(Title 18, United States Code, § 2)

COUNT VI

The Grand Jury further charges:

From on or about August 1, 1973 up to and including September 15, 1973, in the District of Vermont, GERALD L. DUNHAM, also known as Gary Dunham, and ERNEST HARVEY, Jr., the defendants, and others to the Grand Jury known and unknown, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together and with each other to injure, oppress, threaten and intimidate Byron Nutbrown III, a citizen of the United States of America, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, and because of his having exercised said right and privilege, to wit, the right and privilege to give information to the proper authorities concerning violations of federal law, specifically violations of Title 18, United States Code, §§ 371, 2384, 842 and 844.

It was part of the plan and purpose of said conspiracy that on or about September 8, 1973, the defendant ERNEST HARVEY, Jr. did transport said Byron Nutbrown III in an automobile to a place in or near Williamstown, Vermont, where defendant GERALD L. DUNHAM, also known as Gary Dunham, awaited them, for the purpose of interfering with Byron Nutbrown III's anticipated testimony and statements with respect to the facts

surrounding an attempted burglary at LaValley's Lumber Yard, Newport, New Hampshire, and violations of federal explosive materials statutes (18 U.S.C., §§ 842 and 844), of the National Stolen Property Act (18 U.S.C. § 2314), and conspiracy (18 U.S.C. § 371) in connection therewith.

GEORGE L. The foregoing conspiracy resulted in the death of Byron Nutbrown III.

known and intended to violate the laws of the United States (Title 18, United States Code, § 241)

did conspire, with others, to oppress, threaten, or intimidate any person with each other to oppress, threaten, or intimidate Byron Nutbrown III.

A. TRUE BILL

America. in the free exercise and enjoyment

privilege secured

the United States

Charles L. Behr
Foreman

George W. Cook
GEORGE W. COOK
United States Attorney

William B. Gray
WILLIAM B. GRAY
Assistant U.S. Attorney

UNITED STATES OF AMERICA
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)

V.)

Cr. No. 74-62

GERALD L. DUNHAM, also)
known as Gary Dunham,)
and ERNEST HARVEY, JR.)

MOTION OF DEFENDANT HARVEY
TO COMPEL PRODUCTION OF
STATEMENTS OF ALL COCONSPIRATORS
UNDER RULE 16(b)

The defendant Ernest Harvey, Jr. moves that the Court order the attorney for the government to produce for inspection of and copy by attorney for Ernest Harvey, Jr, all statements of all coconspirators to which reference is made in the indictment and who are known to the government, including but not limited to grand jury testimony, on the grounds that:

1. said statements, including testimony of said coconspirators to the grand jury, are within the possession, custody and control of the government; and

2. the herein request is material to the preparation of the defense of defendant Ernest Harvey, Jr., in that

(a) the statements will assist attorney for Ernest Harvey, Jr. to determine the truth of privileged client-to-attorney communications regarding the instant case, and

(b) the statements are necessary to attorney for Ernest Harvey, Jr. in deciding whether to make a motion for severance, and further, the statements may be necessary to the judicial determination of such a motion; and

3. the herein request is reasonable in that producing said statements, and

(a) the government shall have little difficulty in producing said statements, and

(b) the herein request is the only way in which said statements can be obtained by defendant, and

(c) said statements are necessary to preparation of defense and for defense itself of defendant Ernest Harvey, Jr.,

all according to Criminal Rule 16(b) of the Federal Rules of Criminal Procedure.

Respectfully submitted on the 27th
day of August, 1974,

By: /s/ Bennett Evans Greene
Bennett Evans Greene, Attorney
for Defendant Ernest Harvey, Jr.
192 College Street
Burlington, Vermont

CERTIFICATE OF SERVICE

I, Bennett Evans Greene, attorney for Ernest Harvey, Jr., hereby certify that I have served the above Motion of Defendant Harvey to Compel Production of Statements of all Coconspirators under Rule 16(b) on Hon. George W. F. Cook, United State's Attorney, and on Joseph E. Frank, Esq., by mailing them copies pursuant to Rule 49 of the Federal Rules of Criminal Procedure.

Dated at Burlington, Vermont, this 27th day of August, 1974.

/s/ Bennett Evans Greene
Bennett Evans Greene

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

v.

GERALD L. DUNHAM, also known
as Gary Dunham, and
ERNEST HARVEY, Jr.

Criminal No. 74-62

GOVERNMENT'S MEMORANDUM
IN RESPONSE TO MOTIONS BY DEFENDANTS

INTRODUCTION

Each of the defendants has made several motions in this case. This memorandum includes the Government's consent to certain of these motions and its opposition to others, as hereinafter indicated:

I. Motion of Defendant Harvey to Compel Production of
Statements of Co-defendant Dunham Under Rule 16(b) -

As indicated in IV below, the Government consents to furnish and has already furnished to each defendant copies of his own statements. The Government respectfully urges that it does not have the duty or the right to furnish a copy of a defendant's statement to his co-defendants, absent his consent. As the Court stated in United States v. Turner, 274 F.Supp. 412, 418 (E.D. Tenn. 1967):

"Defendant also seeks to discover copies of all statements of reports of interviews of co-defendants, plus transcripts or statements of their grand jury testimony. Each defendant is entitled to inspect his own testimony and the statements made by him but he is not

entitled to inspect the testimony of his co-defendants or to examine their statements unless they agree. United States v. Bailey, D.C., 262 F.Supp. 331; BeneField v. United States, 5 Cir., 370 F.2d 912."

See also United States v. Ahmad, 53 F.R.D. 186, 189 (M.D. Pa. 1971) and cases cited therein.

II. Motion of Defendant Harvey to Compel Production of Criminal Records of Certain Persons Under Rule 16(b) -

On the facts of the case, the Government consents to furnish defendant Harvey with the FBI "rap sheet" or criminal record of George Kiblin, but solely on the grounds that (1) George Kiblin is presently in prison serving a sentence and the fact that he has some prior criminal record is well known to the Government, and (2) it is well known to the parties herein that George Kiblin is expected to be a witness at the trial.

With respect to the request for the criminal record of Gerald L. Dunham, also known as Gary Dunham, the Government will make the same concession if and when it becomes apparent that Mr. Dunham will be a Government witness.

III. Motion of Defendant Harvey to Compel Production of Statements of Co-Conspirators Under Rule 16(b) -

To the extent that this motion requests the prior statements of potential Government witnesses, it is governed by 18 U.S.C. § 3500 and the Government declines to furnish such statements except as provided in that statute. To the extent that this motion requests the

statements of a co-defendant, it is governed by the response in I supra.

IV. Motion of Defendant Harvey to Permit Inspection and Copy Under Rule 16(a) -

1. The Government consents to furnish and has already furnished all written and recorded statements or confessions made by defendant Harvey to his attorney;

2. provided that the Court conditions such discovery upon reciprocal discovery by the Government pursuant to Rule 16(c), Federal Rules of Criminal Procedure, the Government consents to furnish results and reports of physical or mental examinations and of scientific tests or experiments made in connection with the instant case, some of which material has already been provided to defendant Harvey;

3. the Government consents to furnish and has already furnished all testimony by defendant Harvey before the Grand Jury.

V. Motion of Defendants Harvey and Dunham for a Bill of Particulars -

The purpose of the bill of particulars, where the court finds one is necessary, is to inform the accused of the charge against him with sufficient precision to enable him to prepare his defense and avoid surprise, and to enable the defendant to plead his acquittal or conviction in bar of any further prosecution for the same offense.

Wong Tai v. United States, 273 U.S. 77, 82 (1927); United States v. Lebron, 222 F.2d 531, 535-36 (2d Cir.), cert. denied, 350 U.S. 876 (1955); United States v. Bonenarth,

52 F.R.D. 545 (S.D.N.Y. 1971); United States v. Mavrogiorgis, 49 F.R.D. 214 (S.D.N.Y. 1969); United States v. Van Allen, 28 F.R.D. 329, 337-38 (S.D.N.Y. 1961); United States v. Bonnano, 177 F. Supp. 106, 119 (S.D.N.Y. 1959), rev'd on other grounds, 285 F.2d 408 (2d Cir. 1960). See United States v. Salazar, 485 F.2d 1272, 1278 (2d Cir. 1973).

Defendants have each requested a bill of particulars containing 50 items. The Government has consented to furnish the particulars* except with respect to two types of questions: (1) items requesting the manner in which the offenses and the elements were carried out (items 10, 16, 26, 31, 39 and 41); and (2) items requesting a list of all overt acts committed in furtherance of the conspiracy (items 11 and 45). Both of these items are opposed as efforts to obtain disclosure of the Government's evidence in advance of trial. United States v. Conway, 415 F.2d 158, 161 (3rd Cir. 1969), cert. denied, 397 U.S. 944 (1970); United States v. Lebron, supra; United States v. Mavrogiorgis, supra; United States v. Crisona, 271 F. Supp. 150 (S.D.N.Y. 1967), aff'd, 416 F.2d 107 (2d Cir. 1969).

— *

In an effort to minimize litigation of requested particulars, the Government has furnished information with respect to the dates, times and places of the making of the conspiracy (items 1, 2, 3, 43 & 44), although such information is generally not required. United States v. Iannelli, 53 F.R.D. (S.D.N.Y. 1971), and cases there cited. 482, 483

52 F.R.D. 482, 483 (S.D.N.Y. 1971); United States v. Iannelli, 53 F.R.D. 482, 483 (S.D.N.Y. 1971); United States v. Calegro De Lutro, 309 F. Supp. 462 (S.D.N.Y. 1970). The Government expects to prove the overt acts charged.

VI. Defendant Dunham's Motion to Dismiss Count VI -

This motion will be responded to in a separate memorandum.

Respectfully submitted,

George W. F. Cook
GEORGE W. F. COOK
United States Attorney

William B. Gray
WILLIAM B. GRAY
Assistant U. S. Attorney

September 12, 1974

UNITED STATES OF AMERICA
DISTRICT OF VERMONT

UNITED STATES OF AMERICA)

V.)

Cr. No. 74-62

GERALD L. DUNHAM, also)
known as Gary Dunham,)
and ERNEST HARVEY, JR.)

MOTION OF DEFENDANT HARVEY
FOR BILL OF PARTICULARS
UNDER RULE 7(f)

1 The defendant Ernest Harvey, Jr. moves that the Court order
2 the attorney for the government to file a Bill of Particulars
3 which states the allegations of the government as to
4 (1) the place at which the agreement alleged in Count I of the
5 indictment took place;
6 (2) the purpose or purposes of the agreement alleged in Count I
7 of the indictment;
8 (3) the specific date, subject and contents of the agreement
9 alleged in Count I of the indictment;
10 (4) the particularized respective identities and particularized
11 respective values of the goods, wares, merchandise, securities
12 and money of the value of \$5,000 or more, to wit, the proceeds
13 of a burglary, as alleged in Count I of the indictment;
14 (5) the place from which the goods, wares, merchandise, securities
15 and money of the value of \$5,000 or more, to wit, the proceeds of
16 a burglary, as alleged in Count I of the indictment, would be
17 transported;
18 (6) the place to which the goods, wares, merchandise, securities
19 and money of the value of \$5,000 or more, to wit, the proceeds
20 of a burglary, as alleged in Count I of the indictment, would be
21 transported;

1 (7) the names of all persons present when the offense alleged
2 in Count I of the indictment allegedly took place;

3 (8) the names of all co-conspirators, being the other persons
4 known to the Grand Jury as alleged in Count I of the indictment;

5 (9) the means by which the goods, wares, merchandise, securities
6 and money of the value of \$5,000 or more, to wit, the proceeds
7 of a burglary, as alleged in Count I of the indictment, would
8 be transported;

9 (10) the manner in which the offense and all elements of the
10 offense alleged in Count I of the indictment was and were
11 carried out;

12 (11) all overt acts committed in furtherance of and to effect
13 the objects of the conspiracy as alleged in Count I of the
14 indictment;

15 (12) by what means defendants and alleged co-conspirators knew
16 that the goods, wares, merchandise, securities and money of the
17 value of \$5,000 or more, to wit, the proceeds of a burglary, had
18 been stolen as alleged in Count I of the indictment;

19 (13) by what means the defendants and co-conspirators knew that
20 the dynamite had been stolen as alleged in Count I of the
21 indictment;

22 (14) what reasonable cause the defendants and co-conspirators
23 had to believe the dynamite had been stolen as alleged in Count I
24 of the indictment;

25 (15) the dates, subject and contents of the conversations which
26 the defendants and the co-conspirators had with each other as
27 alleged in Count I of the indictment;

(16) the manner in which the offense and all elements of the offense alleged in Count II of the indictment were carried out;

(17) the names of all persons present when the offense alleged in Count II of the indictment took place;

(18) the identity or identities of the alleged person or persons from whom the dynamite was received as alleged in Count II of the indictment;

(19) the means by which the dynamite was shipped and transported as alleged in Count II of the indictment;

(20) the specific place from which the dynamite as alleged in Count II of the indictment was shipped and transported;

(21) the specific place to which the dynamite as alleged in Count II of the indictment was shipped and transported;

(22) the specific identity of the buildings and other real and personal property as alleged in Count II of the indictment;

(23) the specific purpose of using dynamite to damage and destroy buildings and other real and personal property as alleged in Count II of the indictment;

(24) the identity or identities of the person or persons from whom the dynamite was received as alleged in Count II of the indictment;

(25) the names of all persons present when the offense alleged in Count III of the indictment took place;

(26) the manner in which the offense and all elements of the offense alleged in Count III of the indictment was carried out;

(27) the means by which the dynamite was shipped and transported as alleged in Count III of the indictment;

(28) the specific place from which the dynamite as alleged in Count III of the indictment was shipped and transported;

(29) the specific place to which the dynamite as alleged in Count III of the indictment was shipped and transported;

(30) the names of all persons present when the offense alleged in Count IV of the indictment took place;

(31) the manner in which the offense and all elements of the offense alleged in Count IV of the indictment was carried out;

(32) by what means defendants knew that the dynamite has been stolen as alleged in Count IV of the indictment;

(33) what reasonable cause defendants had to believe the dynamite had been stolen as alleged in Count IV of the indictment;

(34) the means by which the dynamite was transported and the manner in which it was disposed of as alleged in Count IV of the indictment;

(35) the specific place from which the dynamite as alleged in Count IV of the indictment was transported;

(36) the specific place to which the dynamite as alleged in Count IV of the indictment was transported;

(37) the identity or identities of the person or persons from whom the dynamite was received as alleged in Count IV of the indictment;

(38) the names of all persons present when the offense alleged in Count V of the indictment took place;

(39) the manner in which the offense and all elements of the offense alleged in Count V of the indictment was carried out;

- (40) the names of all persons present when the offense alleged in Count VI of the indictment took place;
- (41) the manner in which the offense and all elements of the offense alleged in Count VI of the indictment was and were carried out;
- (42) the names of all co-conspirators, being the other persons known to the Grand Jury as alleged in Count VI of the indictment;
- (43) the specific date, subject and contents of the agreement alleged in Count VI of the indictment;
- (44) the place at which the agreement alleged in Count VI of the indictment took place;
- (45) all overt acts committed in furtherance of and to effect the object of the conspiracy as alleged in Count VI of the indictment;
- (46) the particularized way in which the conspiracy resulted in the death of Byron Nutbrown III as alleged in Count VI of the indictment;
- (47) the date and time of the attempted burglary at LaValley's Lumber Yard, Newport, New Hampshire as alleged in Count VI of the indictment;
- (48) the names of all persons present when the attempted burglary took place as alleged in Count VI of the indictment;
- (49) the date and times when, and places where, and the names
- (50) the names, offices and locations of the "proper authorities" as alleged in Count VI of the indictment.

FURTHER, defendant Ernest Harvey, Jr. moves that the order of the Court require said Bill of Particulars be filed at such time and in such manner as will enable defendant Ernest Harvey, Jr.

to timely prepare his defense to the allegations contained in the indictment and in said Bill of Particulars, all on the grounds that:

1. the indictment is couched in such language that defendant Harvey may be prejudicially surprised at trial; and

2. the particulars requested, and each of them, are necessary

- (a) for the adequate preparation of a defense, and
- (b) to prevent prejudicial surprise to defendant at trial, and
- (c) to permit a plea of double jeopardy in the event of a subsequent prosecution for the same offense or offenses, and
- (d) to apprise defendant of allegations of fact upon which charges are based, and
- (e) to apprise defendant of the charges against him, and
- (f) to make the indictment more definite and certain;

all according to Criminal Rule 7(f) of the Federal Rules of Criminal Procedure.

Dated at Burlington, District of Vermont this 27th day of August, 1974.

Respectfully submitted,

By: /s/ Bennett Evans Greene
Bennett Evans Greene, Attorney
for Defendant Ernest Harvey, Jr.
192 College Street
Burlington, Vermont

CERTIFICATE OF SERVICE

I, Bennett Evans Greene, attorney for Ernest Harvey, Jr., hereby certify that I have served the above Motion of Defendant Harvey for Bill of Particulars under Rule 7(f) on Hon. George W. F. Cook, United State's Attorney, and on Joseph E. Frank, Esq. by mailing them copies pursuant to Rule 49 of the Federal Rules of Criminal Procedure.

Dated at Burlington, Vermont, this 27th day of August, 1974.

/s/ Bennett Evans Greene
Bennett Evans Greene

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

v.

GERALD L. DUNHAM, also
known as Gary Dunham,
and ERNEST HARVEY, JR.

CRIMINAL NO. 74-62

BILL OF PARTICULARS

The UNITED STATES OF AMERICA, in response to the motion by defendants GERALD L. DUNHAM, also known as Gary L. Dunham and Ernest Harvey, Jr., hereby states as follows:

1. The conspiracy alleged in Count I resulted from several meetings between the co-conspirators, principally within the State of Vermont, and from telephone conversations.
2. Among the purposes of the conspiracy alleged in Count I, was the plan to burglarize LaValley's Lumber Yard, Newport, New Hampshire.
3. The specific date, if any, precise subject and contents of the agreement alleged in Count I are unknown, except as generally indicated in the indictment and herein.
4. The defendants sought to steal cash and other property of a value of at least \$10,000.
5. LaValley's Lumber Yard, Newport, New Hampshire.

6. A portion of the proceeds of the burglary in excess of \$5,000. would be transported to unknown places within the State of Vermont.

7. The offense alleged in Count I took place over a period of time; no persons other than the defendants and the co-conspirators are known to have been present.

8. George Kiblin and Byron Nutbrown, III.

9. The exact means are unknown, probably by automobile.

10. This request is objected to except as answered herein.
See Memorandum.

11. The Government expects to prove at least one of the overt acts alleged in the indictment. See Memorandum.

12. The defendants' knowledge resulted from their intention to steal the goods, wares, merchandise, securities and money.

13. The means are unknown at this time.

14. The cause of the defendants' knowledge is unknown.

15. The precise dates of the conversations are unknown; the subject and contents of the conversations dealt with their plan to burglarize LaValley's Lumber Yard.

16. See 10, supra.

17. Byron Nutbrown, III was present during the transportation; George Kiblin was present after the dynamite arrived in Newport, New Hampshire.

18. The Government does not intend to prove how the defendants received the dynamite and such proof is immaterial.

19. By automobile.
20. From the vicinity of Barre and Williamstown, Vermont.
21. To a gravel pit and later to LaValley's Lumber Yard, all in the vicinity of Newport, New Hampshire.
22. The defendants knew and intended that the dynamite would be used to damage and destroy the buildings and property, principally a safe, of LaValley's Lumber Yard, Newport, New Hampshire.
23. The purpose of using the dynamite was to effect a burglary at LaValley's Lumber Yard and to blow open a safe located there.
24. See 18, supra.
25. See 17, supra.
26. See 10, supra.
27. By automobile.
28. See 20, supra.
29. See 21, supra.
30. See 17, supra.
31. See 10, supra.
32. See 13, supra.
33. See 14, supra.
34. The dynamite was transported by automobile.
35. See 20, supra.
36. See 21, supra.
37. See 18, supra.
38. See 17, supra.
39. See 10, supra.

40. The offense took place over a period of time; in addition to the defendants, George Kiblin and Mrs. Gary Dunham were present during some activities by the defendants and the co-conspirators which were part of the offense. Other persons may have been present during other such activities.

41. See 10, supra.

42. George Kiblin, Mrs. Gary Dunham.

43. The conspiracy existed during a part of August and September 1973; the general subject and contents of the conspiracy was a plan to interfere with Byron Nutbrown III's anticipated testimony and statements as charged in Count VI.

44. While the conspiracy existed, the defendants were in a number of different places including Newport, New Hampshire, Ascutney, Barre, Williamstown and Washington, Vermont.

45. The Government expects to prove one of the overt acts alleged in Count VI of the indictment. See Memorandum.

46. The defendants killed Byron Nutbrown, III, but the precise manner of death is unknown at this time, except as set forth in the autopsy reports previously furnished to counsel.

47. During the late evening of August 3, 1973, and the early morning of August 4, 1973.

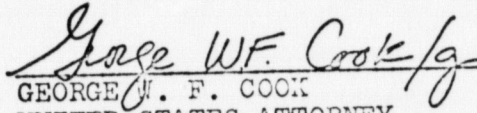
48. The defendants and George Kiblin and Byron Nutbrown, III were present during various stages of the attempted burglary; the attempted burglary was interrupted when two police officers arrived.

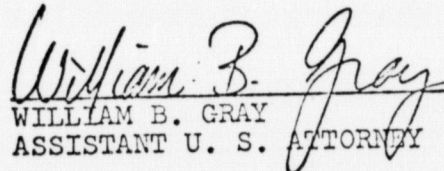
49. See 1 - 38, supra.

50. Local, State and federal law enforcement officers in Vermont and New Hampshire.

Dated at Rutland, in the District of Vermont,
this 12th day of September, 1974.

UNITED STATES OF AMERICA


GEORGE W. F. COOK
UNITED STATES ATTORNEY


WILLIAM B. GRAY
ASSISTANT U. S. ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

v.

GERALD L. DUNHAM, also
known as Gary Dunham,
and ERNEST HARVEY, Jr.

Criminal No. 74-62

AMENDED BILL OF PARTICULARS

The UNITED STATES OF AMERICA hereby amends its previously filed Bill of Particulars, dated September 12, 1974, and the statement of facts set forth in its memorandum of law in opposition to motion to dismiss Count VI, dated September 19, 1974, as follows, with respect to the items indicated:

2. Among the primary purposes of the conspiracy alleged in Count I was the plan, to burglarize LaValley's Lumber Yard, Newport, New Hampshire.

4. Add: The precise amounts, identity and value are unknown.

34. Add: The dynamite was seized from George Kiblin by law enforcement officers at the scene of the attempted burglary.


40. Add: The identity of other persons who may have been present is unknown.

50. The background facts are set forth in Government's Memorandum of Law in Opposition to Motion to Dismiss

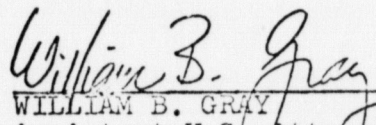
Count VI, dated September 19, 1974. In addition, the Government expects to prove that the possibility of federal charges was actually discussed among the co-conspirators in Count VI.

Dated at Rutland, in the District of Vermont, this 24th day of September, 1974.

UNITED STATES OF AMERICA



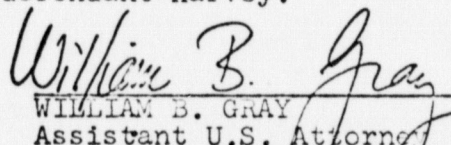
GEORGE W. COOK
United States Attorney



WILLIAM B. GRAY
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify this 24th day of September, 1974 that I served the foregoing AMENDED BILL OF PARTICULARS upon the defendants, by mailing copies of same with postage prepaid as follows: Joseph E. Frank, Esq., 135 College Street, Burlington, VT 05401, Attorney for defendant Dunham; Bennett E. Greene, Esq., 192 College Street, Burlington, VT 05401, Attorney for defendant Harvey.



WILLIAM B. GRAY
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

v.

GERALD L. DUNHAM, also
known as Gary Dunham,
and ERNEST HARVEY, JR.

CRIMINAL NO. 74-62

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS COUNT VI

Introduction

This memorandum is submitted in opposition to the motion by defendant Dunham to dismiss Count VI on the ground that there is no federal jurisdiction over the alleged offense and that Count VI fails to allege an offense within the scope of 18 U.S.C. § 241. In the event that defendant Dunham withdraws this motion, the Government respectfully requests the Court to consider the motion, sua sponte. Should this motion be raised for the first time at trial, and be granted by the District Court, jeopardy will have attached and the Government will lose its right of appeal in 18 U.S.C. §3731.

Facts

The following statement of facts may be considered as supplemental to the Bill of Particulars previously filed.

Byron Nutbrown, III participated with defendants Gary Dunham and Ernest Harvey in an attempted burglary in the vicinity of Newport, New Hampshire. During the course of the attempted burglary, in which one George Kiblin was also a participant, the offenses charged in Count I - V of the indictment were committed by the defendants. The attempted burglary was interrupted when two Newport, New Hampshire police officers arrived at the scene and arrested George Kiblin, in the possession of dynamite. Ernest Harvey, Jr. escaped from the scene of the burglary and Gary Dunham was arrested waiting in Harvey's car in a nearby gravel pit. Byron Nutbrown, III was located in a nearby house, after making a phone call to his mother explaining what had happened. As a result, Nutbrown was scheduled to be a witness against Dunham, Harvey and Kiblin in a New Hampshire prosecution. This attempted burglary and the arrests took place during the evening of August 3, 1973 and in the early morning of August 4, 1973.

Shortly after the attempted burglary in Newport, New Hampshire, Nutbrown was interviewed first by Newport, New Hampshire police officers and later by Detective Ronald West of the Barre City Police Department and Sergeant Lawrence Wade of the Vermont State Police. Nutbrown told Detective West and Sergeant Wade the basic facts underlying the attempted burglary, and Detective West and Sergeant Wade both commenced an investigation of the matter, principally to determine whether Harvey, Dunham, Kiblin and Nutbrown were involved in several unsolved

breaking and entering cases in the vicinity of Barre, Vermont, including at least one case in which dynamite was stolen. On September 8, 1973, at the time of Nutbrown's death, West and Wade had not yet communicated with federal agents with respect to the facts of this case, primarily because Wade did not consider the investigation sufficiently complete. Wade will testify, however, that a State Police regulation and his own personal practice would have led him to relate the facts showing federal violations to both the FBI (with respect to interstate transportation of stolen property under 18 U.S.C. 2314 and 18 U.S.C. 371) and AT&F (with respect to interstate transportation of dynamite by convicted felons, the latter carrying a maximum penalty of 10 years and/or \$10,000.00 under 18 U.S.C. 841 and 849.)

During the remainder of August and early September defendants Dunham and Harvey agreed that they had to prevent Byron Nutbrown from telling what he knew about this incident. On September 8, 1973 near Williamstown, Vermont, Dunham and Harvey, assisted George Kiblin who drove a car for them, killed Byron Nutbrown in order to silence him. Between the date of the attempted burglary in early August and the date of his death on September 8, 1973, Nutbrown had given several statements to New Hampshire police, Barre, Vermont police, and Vermont State Police implicating Dunham and Harvey in the attempted burglary. These statements, and other statements Nutbrown made to friends, show that he was aware of facts which showed that Dunham and Harvey had committed several federal offenses, particularly the offenses charged in Counts I - V of the indictment.

Argument

The basic thrust of defendant Dunham's memorandum of law in support of his motion to dismiss Count VI is that 18 U.S.C. § 241 does not cover a citizen's right to inform State authorities regarding violations of State Law.

This argument is not applicable to Count VI of the indictment in this case since, as noted in the preceding amendment to the Bill of Particulars and in Count VI, the Government's charge relates to the right of Byron Nutbrown III to inform local, state and federal law enforcement officials of facts supporting a Federal charge against defendants Dunham and Harvey under 18 U.S.C. § 2314 and 18 U.S.C. § 371, carrying maximum penalties of 5 years imprisonment and a \$10,000.00 fine, or both, and under 18 U.S.C. § 841 and 849, carrying maximum penalties of 10 years imprisonment and a \$10,000.00 fine, or both.

It is the Government's position that 18 U.S.C. § 241 is a valid charge under in re Quarles, 158 U.S. 532 (15 Sup.Ct.959 (1895) which holds that the predecessor statute of § 241, there involved, gives to a private citizen the right and duty "to communicate to the executive officers any information which he has of the commission of any offense against these laws." (laws of the United States). See in re Quarles at page 961. The right of a citizen informing of a violation of Federal law depends on the establishment of a national government. Id at 961. "To leave to the several states the prosecution and punishment of conspiracies to oppress citizens of the United States, in performing the

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duty and exercising the right of assisting to uphold and enforce the laws of the United States, would tend to defeat the independence and the supremacy of the national government." (Id at 961).

The fact that Nutbrown had given information to state law enforcement officials relating to a State offense is no bar to an 18 U.S.C. § 241 prosecution where federal offenses were also a part of such information.

Nothing in in re Quarles, 158 U.S. 532 (1895), suggests that the deceased victim must already have given information to federal authorities or be on the verge of testifying in a federal trial. It should be sufficient that the deceased victim was in possession of facts showing a federal crime, among others, and that the defendants killed him in order to silence him in all respects. If Dunham and Harvey killed Nutbrown to keep him from testifying about the facts he knew, and if the facts he knew showed or tended to show a federal violation, then it was undoubtedly one of the objects of the conspiracy to silence him to prevent his giving evidence to federal officials or in a federal trial. While it may be that the defendants' most immediate purpose was to prevent Nutbrown from testifying in New Hampshire, surely they also were concerned that he would give the same testimony elsewhere in another court, or to other law enforcement agents.

In the recent case of United States v. Anderson, 42 LW 4815 (June, 1974) the United States Supreme Court held that where a conspiracy had as its primary purpose the casting of false ballots to effect the outcome in a local election, an 18 U.S.C. § 241 violation was none the less made out where the false ballots in fact did effect a federal election. The Supreme Court reasoned that it was not the intent of the conspirators which was controlling, but the fact that citizens voting for federal officials had their ballots effected by the fraud.

Thus, it is sufficient if Dunham and Harvey's conspiracy to silence Nutbrown resulted in Nutbrown's being unable to inform and testify about what were in fact substantial federal criminal violations.

Conclusion

The motion to dismiss Count VI should be denied in all respects.

Respectfully submitted,
UNITED STATES OF AMERICA

GEORGE W. F. COOK
United States Attorney

WILLIAM B. GRAY
Assistant U.S. Attorney

September 19, 1974.

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IN THE
CERTIFICATE OF SERVICE.

I, George W. F. Cook, United States Attorney,
hereby certify that I served the foregoing MEMORANDUM IN
OPPOSITION TO MOTION TO DISMISS COUNT VI, on attorneys
Joseph E. Frank, Esquire, and Bennett Evans Greene, Esquire,
by hand delivering the same this 20th day of September,
1974.

GEORGE W. F. COOK
UNITED STATES ATTORNEY

NEWPORT POLICE DEPT. — NEWPORT, N. H.

PAGE 1

VOLUNTARY STATEMENT

DATE 8/4/73 PLACE Newport Police Dept. TIME STARTED 2:45 am M.

I, BYRON NUTEROWN III, am 15 years old. My date of birth is 7/11/58

I live at 27 1/2 Granite St. Barre, Vt.

The person to whom I give the following voluntary statement, Thomas Mynczywor

having identified and made himself known as a police officer



DULY WARNED AND ADVISED ME, AND I KNOW:

1. That I have the right to remain silent and not make any statement at all, nor incriminate myself in any manner whatsoever.
2. That anything I say can and will be used against me in a court or courts of law for the offense or offenses concerning which this statement is herein made.
3. That I can hire a lawyer of my own choice to be present and advise me before and during this statement.
4. That if I am unable to hire a lawyer I can request and receive appointment of a lawyer by the proper authority, without cost or charge to me, to be present and advise me before and during this statement.
5. That I can refuse to answer any questions or stop giving this statement any time I want to.
6. That no law enforcement officer can prompt me what to say in this statement, nor write it out for me unless I choose for him to do so.

A. No one denied me of any of my rights, threatened or mistreated me, either by word or act, to force me to make known the facts in this statement. No one gave, offered or promised me anything whatsoever to make known the facts in this statement, which I give voluntarily of my own free will and accord.

B. I do not want to talk to a lawyer before or during the time I give the following true facts, and I knowingly and purposely waive my right to the advice and presence of a lawyer before and during this statement.

C. I certify that no attempt was made by any law enforcement officer to prompt me what to say, nor was I refused any request that the statement be stopped, nor at anytime during this statement did I request for the presence or advice of a lawyer.

I have read each page of this statement consisting of 1 pages, each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at 3:10am M. on the 4th day of Aug., 19 73

WITNESS: Thomas J. Mynczywor

WITNESS: Wm. A. Murray

Byron Nuterown
Signature of person giving voluntary statement.

STATEMENT OF:

Date 8/4/73

Page No. I

BYRON NUTBROWN III dob 7/11/58 27 1/2 Granite St. Barre, Vt.

At about 6pm on 8/3/73 I went to see Ernie Harvey at his house on Church St in Barre, Vt. I went to see him because we were good friends. There I also met Gary Dunham. Ernie asked me if I wanted to go for a ride to N.H. with him. I said yes and we left with Gary at about 8:40pm. Ernie drove to N.H. and picked up George Kiplin at about 10:15pm.

We went to a gas station and George bought cigarettes and a six pack of beer. Maybe Petco. From there we went to the A & W then we went up to the gravel pit and they looked around. Then Gary started driving and drove down to the lumber place.

We all got out across the street from the lumber place and they started to talk about cutting the wires and going into the place. This is the first time I heard them talk about going into someplace. No one said anything coming from Vermont. Or when we picked up George. Ernie and George crossed the street to the lumber yard with Ernie carrying the sack with a bar. They asked me to stay by the side of the road and watch for the police. Then they ran along side of the fence along the river to the back of the place. And Gary drove off.

They said that Gary was to keep the car out of sight and come back in a couple of hours.

After Gary left I stood there for a few minutes and then I started running down the side of the road towards town. I stopped a lot and fell asleep in the bushes. Then I woke up and started down the road again when I saw a guy drive into his yard in front of his house and into his house. I went up and knocked on the door and asked to use the phone to call my mother in Barre. He asked what was the matter and I told him and then he called the police.

Byron Nutbrown III

(September 16, 1974)

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sidered, and I think the revised rules of criminal procedure may well make discovery a broadened discovery in federal courts, but this is the ruling of this Court.

MR. GREENE. After being persuaded by argument of counsel, I wish to join in.

THE COURT. We consider you have joined in.

We have the motion of Defendant Harvey to compel production of statements of all coconspirators under Rule 16(b). Anything additional you wish to say, Mr. Greene?

*MR. GREENE. One thing, your Honor. Prior to receiving Government's bill of particulars, of course, defendant has not known the names of the coconspirators alleged by the Government. We see in the Government's response to that request that they are relying on Title 18, Section 3500 in not granting the motion, or not consenting to the motion.

Now that argument, of course, however valid it may be when applied to prospective Government witnesses cannot apply to any statement, or statements, made by the co-conspirator identified in the bill of particulars as Byron Nutbrown III. According to Government's allegations, he cannot be a witness. Rule 3500 has no application to that, and, therefore, we say at the very least the statement of that co-conspirator should be produced.

MR. FRANK. I join in that argument, your Honor.

THE COURT. Mr. Gray?

MR. GRAY. May I have a moment, your Honor?

THE COURT. Yes.

*MR. GRAY. First of all, your Honor, we certainly acknowledge that Section 3500 doesn't apply to any statement that may have been made by Byron Nutbrown.

On behalf of the Government, I oppose any order compelling the furnishing of any statement that may have been made by him, but in so doing, I might suggest to your Honor, this too might be an appropriate subject for next Thursday's meeting in light of what I think are very similar related questions with respect to jurisdiction and otherwise.

I don't know of any authority for ever furnishing the statement of one who is alleged to be a coconspirator other than under 3500 and in the manner prescribed by 3500, and would oppose an order, as I stated, compelling disclosure of such a statement, but I would think it might be easier for the Court to rule on this on Thursday in light of the other questions raised at that time.

*THE COURT. Well, I have given this matter some consideration, Mr. Gray, based upon what has been filed by counsel both for the defendants and the Government, and I think it is governed by 3500. I don't think the defendant is entitled to this information. However, I will reserve my ruling until Thursday in light of the statement made by Mr. Gray.

MR. GRAY. I simply thought we would be here on Thursday and we'll be talking about jurisdiction, talking about things somebody may have said to somebody and by whom.

*THE COURT. All right. I will reserve my ruling because apparently on Thursday we'll get into this matter in considerably more depth than we are today.

MR. GRAY. I think so, your Honor.

THE COURT. All right, the next motion is motion of Defendant Harvey to compel production of criminal records of certain persons under Rule 16(b). The Government has made some response to that in their memoranda. Is that satisfactory, Mr. Greene?

MR. GREENE. Of course, we would like to see the so-called F.B.I. rap sheets as named in the response of the Government, but the Government does say we will be permitted to see, and I anticipate before trial that type of record for Mr. Kiblin for the reasons stated, and that certainly is acceptable and the Government also stated in the event that Codefendant Dunham is called as a witness, then in that event we may also see the same type of material regarding him, and that is acceptable. Is my understanding of the Government's position clear?

THE COURT. Mr. Frank?

MR. FRANK. Your Honor, if it were to become necessary to obtain certified copies of convictions, that would

(September 20, 1974; 10:20 a.m.)

THE COURT. This is Criminal File 74-62, United States of America versus Gerald Dunham and Ernest Harvey, Jr. The matter before the Court is the continuation of the hearing on certain motions filed on behalf of the defendants.

On the motion of Defendant Harvey to compel production of the statement of Co-defendant Dunham under Rule 16(b), the Court reserved its decision, and at this time denies the motion. *Likewise, the motion of Defendant Harvey to compel production of statements of all co-conspirators under Rule 16(b), the Court reserved decision, and at this time denies that motion; and, insofar as the bill of particulars is concerned, I think we covered everything except Item 50, and in connection with the memorandum filed by the Government today, there is additional facts concerning that specificity which would appear to be sufficient as far as the Court is concerned. Do you have anything to say about that, Mr. Greene?

*MR. GREENE. Yes, your Honor. The motion to produce the statement of Co-defendant Dunham and denial of the motions to produce statements of co-conspirators, we just wish the record to show our objection.

THE COURT. The record shows that anyway.

MR. GREENE. And, on Question 50, we have received the Government's memorandum, and argument, and statement

(September 20, 1974)

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to take more than one week. Mr. Frank, do you agree with that?

MR. FRANK. My intuition is that the case would take more than a week, but that is merely an intuition, because I do not know how many witnesses the Government intends to call.

THE COURT. I understand that. Then we have one further item I should mention to counsel, and that is the possibility of sequestering the jury. I do not favor sequestration as a customary rule. Anybody have any specific thoughts on this at this time?

MR. FRANK. Your Honor, we have a charge in this case which is punishable by life imprisonment as the maximum sentence, and I am not aware of any charge that could be more serious in terms of a possible sentence of the defendants other than the Lindberg kidnapping charge, if there is still a possible death sentence in that. I am not sure if there is, or isn't, but for all practical purposes, this is as serious a charge as there is in federal law in terms of the possibility of punishment, and I refer to Count VI, of course. So because of the gravity of the charge in Count VI, unless the Government would presently withdraw it--well, the Court has already indicated they would not dismiss it, but I would urge upon the Court that the Jury be sequestered during the trial.

THE COURT. Mr. Greene, do you join in that?

MR. GREENE. I also join in that, your Honor.

I feel that the charge is as serious a charge as a charge can be, and due to that, I feel that every procedure should be undertaken to assure the possibility, not the possibility but the certainty of a fair trial and to prevent any possibility of any matter creeping into the case which would make an unfair trial. So if there ever were a case where sequestration were in order, this certainly would be that case.

THE COURT. Why do you think it is necessary? You don't seem to have as much faith in the jury system, unsequestered, as I do, or jurors, I guess.

MR. GREENE. I didn't feel my faith in the jury system---

THE COURT. I guess I should say, "jurors". What makes you think, under appropriate instructions, they can't---

MR. GREENE. My feeling is no matter how hard any individual attempts to follow the instructions of the Court, that extraneous influences can, and probably will have an affect whether the individual juror wants it to or not. I also think it puts a great strain on any juror to be subjected to not merely temptations, but puts a great strain on a jury who may be subjected to newspapers, television, or radio reports, conversations of other people, and as I said, if sequestration is in order at all in any case, then this case is serious enough so that it must be in order in this case.

THE COURT. What do the attorneys for the Government say?

MR. GRAY. The Government does not oppose sequestration of the Jury, but I would throw out, we are not at all convinced it is necessary. I am referring not only to the ability of the Jury to follow the directions about what they come in contact with, but also the likelihood they would come in contact with anything they shouldn't see, because we know from the coverage of cases before this Court, the reporters generally cover only that which happens in open court, and even if a juror should come across something that was said before them in the court, I don't think there is very much danger of prejudice, because they will have heard it firsthand themselves, and their own exposure to it, and own recollection is what should govern, and I don't think the dangers are that great.

I would point out what is so obvious to everyone; sequestration of the Jury does make it much more difficult to find a fair cross section of the community to decide this important case, and in some respects precludes the participation of a large segment of the community. Certainly, any young mother, or, indeed, anybody with family responsibility would almost be precluded from serving, and I think there are significant dangers from drawing such a narrow segment of the society.

THE COURT. I have grave doubts in my own mind sequestration really accomplishes an awful lot towards, or increases materially the chances for a fair trial, and I think, some times, it has an opposite reaction, although I will admit that if you deny papers and television to the jurors during that period of time, that type of outside influence will not come into play, and also the possibility of talking it over with someone in their family, although we try to give them pretty good instructions as far as that is concerned.

I think it is within the discretion of the Court and something I will have to take under consideration. Anything further at this time?

MR. FRANK. May I have a moment with Mr. Greene, your Honor?

THE COURT. Yes.

(Mr. Frank conferred with Mr. Greene)

MR. FRANK. Mr. Greene and I have been conferring for a moment on the severance issue which remains for the Court, and we are both concerned with an early decision on that question, and each of us would be agreeable to moving the dead line back to noon on Monday if the Court believes that it could then render a decision within the day.

THE COURT. Fine. You give me what you will want by noon on Monday, and I will consider it. I do have a